DOCUMENT RESUME

ED 413 654 EA 028 748

AUTHOR Michaelis, Karen L.
TITLE Negotiating the Borders of Adolescence: Eroding the Culture of Disrespect for the Rights of Students.
PUB DATE 1997-10-00
NOTE 33p.; Paper presented at the Annual Meeting of the University Council for Educational Administration (11th, Orlando, FL, October 1997).
PUB TYPE Opinion Papers (120) -- Speeches/Meeting Papers (150)
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Civil Rights; Constitutional Law; *Court Litigation; Due Process; Elementary Secondary Education; *Labeling (Of Persons); School Law; *Search and Seizure; Sociology; Stereotypes; *Student Rights

ABSTRACT

Although most parents want school officials to enforce rules for a drug-free school environment, they often feel differently when their own children are the objects of student searches. This paper argues that as long as searches are directed at "others,"--those who are known or assumed to be guilty of school rule violations or criminal activity--people tend to believe that searches by school officials are justified. The paper describes how and why the concept of the "other" or enemy is created. School administrators, with the help of the judicial system, have applied that process to certain types of students to justify increasingly intrusive searches by school officials for a wide range of infractions. James Aho's model explaining how enemies are created (1994) is used to compare two strip-search cases decided by the Seventh Circuit Court and similar cases in other jurisdictions. The discussion illustrates changes in courts' handling of school search cases over the last 15 years. The conclusion challenges educators to acknowledge their role in creating and perpetuating an enemy whose only place in society is outside the social norm. Two figures are included. (Contains 23 references.) (LMI)

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Negotiating the Borders of Adolescence: Eroding the Culture of Disrespect for the Rights of Students

Paper Presented at

UCEA

Orlando, FL

October, 1997

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Karen L. Michaelis
Washington State University
Dept. of Ed Leadership & Co Psy
351 Cleveland Hall
Pullman, WA 99164-2136
(509) 334-7384

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Introduction

Searching public school students is a volatile issue. Those on either side of the issue have strongly held beliefs about the propriety of searching students, about the intrusiveness of the search, about whether or not school officials should be searching at all for illegal or contraband items, particularly as searches become more intrusive.

Parents of students who are searched at school react strongly to news that their own child has been subjected to that treatment. A review of newspaper reports following strip search incidents in elementary and secondary schools reveals that parents strenuously object to strip searches of their children and demand policy changes in response to such searches that would severely restrict the authority of school officials to conduct intrusive searches such as strip searches.

It is clear from those newspaper reports that while the public, including parents of school-aged children, want school officials to ensure a drug-free learning environment, sentiments change drastically when someone's own child is searched. At that moment, the issue becomes personal. Most parents believe that strip searches are aimed at children who bring drugs, or carry other contraband to school. They fail to realize, until their own child is searched, that the grant of authority to school officials to control and discipline students, including subjecting any student to searches of varying degrees of intrusiveness, includes their own, presumed innocent child. As long as searches are directed at others--those who we know or assume to be guilty of school rule violations or criminal activity--we believe searches by school officials are justified. After all, suspicion doesn't fall on innocent people. Or so they believe until it is their child who is searched.

Judicial Approach

Courts have reacted differently to searches of students by school officials than to other types of searches conducted by the police. Courts have loosened the standard governing school searches by school officials and characterized school searches as appropriate and legal, in many instances, that would otherwise constitute illegal searches if they were conducted outside the school setting.

The increasing judicial leniency in evaluating searches of students raises some troubling issues concerning the vitality of students' fourth amendment rights in public schools. But more

troubling are the questions such searches raise about who is being searched and why.

Several recent publications dealing with how and why the "other" or enemy is created offer some useful insights into why our society needs an enemy and who is likely to become the enemy. While the notion of creating an enemy has not been dealt with in the education literature extensively, sociologists have long considered the process of creating the enemy as well as the characteristics the enemy possesses. What results is a battle of language over how the acts of either party are characterized.

In this paper I will describe why and how enemies are created. I will show how school administrators, with the assistance of the judicial system, have applied that process to certain types of students to justify increasingly intrusive searches by school officials for a wide range of infractions. To do this, two strip search cases, decided by the Seventh Circuit Court, supported by similar cases in other jurisdictions, will be compared using the model described by James Aho for creating an enemy to illustrate a change over the past 15 years in the way courts are deciding school search cases. The paper will conclude with a challenge to all educators to acknowledge their role in creating and perpetuating an enemy whose only place in society is outside the social norm.

Creating the Enemy

I will begin by describing the process through which enemies are created. Of initial concern is the question, why do we create an enemy? One of the reasons enemies are created is to project our darker impulses onto the other "to dispose of [our] accumulated, disowned, psychological toxins" (Keen, 1986, p. 21). In so doing, "the shadow elements of the self (greed, cruelty, sadism, hostility) disappear and become qualities attributed to the enemy" (Keen, p. 19).

A second reason enemies are created is to bring cohesion or harmony to the social group embodying the social norm (Ross, 1996, Aho, 1994, Keen, 1986). The harmony that emerges when groups unify against a certain class of people is the result of a "process [that] begins with a splitting of the 'good' self, with which we consciously identify and which is celebrated by myth and media, from the 'bad' self, which remains unconscious so long as it may be projected onto an enemy" (Keen, p. 19).

Aho states that it is through the process of reification that an enemy is constructed. There are four steps in the reification process, identified by Aho (1994), that build upon each preceding step, ultimately resulting in the creation of a socially constructed and accepted enemy. The process begins, simply enough, with a name or label being attached to an individual or group of individuals. Through the act of naming/labeling an individual, through "defamatory language" (Aho, p. 28), the label is believed as a truthful depiction of that individual or group, thereby accomplishing the identification of who the enemy is. The name/label provides the justification for social insiders to believe that the name/label is the truth about the "other".

The name/label is further embedded as truth through legitimation, where members of the social group and the "other" participate in a sacred ceremony replete with special costumes and procedures. For students, the ceremony can have multiple phases beginning with the schools' disciplinary process and culminating with the "others'" appearance in court prior to sentencing the student for his/her crimes. The special costumes involved are necessary "to reconstitute people into beings appropriate for exile or destruction" (Aho, p. 29).

Citing Harold Garfinkles' work, Aho describes the six conditions necessary to recast individuals as evil and to justify their exclusion from society:

> 1) They must be held in extraordinary, hallowed precincts, on sacred ground, at sacred times, with the victim and executioners alike arrayed in special costumery. 2) All the actors, including the victim, must assume an attitude of solemn reverence toward the proceedings. 3) The accusers called to testify against the victim must show themselves to be motivated by patriotic concern for "tribal values," not by private considerations of vengeance, envy, or greed. 4) The tribal values must be made explicit in the course of testimony. 5) The accusers must demonstrate that nothing in the victim's life is accidental, but is part of a uniform gestalt, or action type ("evil"). 6) This action type must be rhetorically counterpoised against its opposite - such as "Christian American" - or self-evident virtue and dignity (and of which the accusers must be examples").

In the school setting, disciplinary or expulsion proceedings provide the stage upon which the preceding six conditions are played out. The student's record is reiterated in detail, thereby portraying the student as dangerous and/or out of control; as an individual who single-handedly jeopardizes the educational environment and, more importantly, the health, safety and welfare of well-behaved, innocent students.

Students subjected to the ceremonial legitimation of the evil those students possess, frequently are children of color, low socio-economic status from single parent homes. Such a family history leads into the second step in the reification process, mythmaking. The purpose of mythmaking is to provide "biographical or historical accounts of defamed persons showing why it is inevitable, necessary and predictable that they act as they do - namely, as evil ones" (Aho, p. 29).

It is at this step that the social group begins to embellish the story of the individual's evilness by stripping away details and facts of the socially constructed story either through the official "public degradation ceremony" (Aho, p. 30), such as a school disciplinary or expulsion procedure, or in a more serious legal proceeding involving the judicial system; or informally through the local grapevine where "the reconstructions of his background becom[e] even more fanciful" (Aho, p. 30).

To ensure that the myth survives, it must be passed on from one person to the next, ultimately across generations. To accomplish this third step in the reification process - sedimentation - the details and subleties of the defamatory message are edited out, making the message/story more succinct and easier to remember and recall (Aho, 1995). Eventually, the story is reduced to a mnemonic cant" (Aho, p. 31). "It is passed easily from generation to generation ensuring that the truth about the enemy will survive even for those who have never experienced the enemy.

For students, sedimentation occurs through several routes. One route the story about the student takes is through official documents generated by school officials about the student's misbehavior over the years at school. Once a student has been officially identified by school officials as a behavior problem, that student will frequently be accused of future wrongdoing regardless of the existing evidence or lack of evidence pointing to the previously misbehaving student. The label of troublemaker has stuck and all future misbehavior will

be readily believed to have been caused by one who has misbehaved in the past. As students pass from grade to grade or school to school, the student's records follow him/her. Therefore, before the student can demonstrate the truth of falsity of the reported behavioral pattern, school officials are already on alert to that student's past record.

A second route to accomplish sedimentation is through the student grapevine. Students talk about whose behavior violates established student norms of behavior. The student identified as a rule breaker is either vilified or ostracized by the primary social group.

A student also may be identified as an enemy by the informal parent/community grapevine. Stories passed through this grapevine are the furthest removed from direct experience with the student enemy (in most instances), but the stories are readily believed because those who initiate and pass such stories on are social insiders who are believed by the group by virtue of their membership in the group. As a result, the enemy is known and hated by a much larger group of people than those who have actual experience with the enemy's evildoings.

The fourth, and final step in the reification process is the ritual. It is at this step where overt action against the enemy is most likely to occur as those who believe they are upholding the social good act against the designated enemy "with secrecy, caution, cunning, and, if necessary, cruelty (Aho, p. 31). Social insiders feel compelled to treat the enemy in this way because, in their belief, the enemy would respond with aggression to any kindness shown them (Aho, 1994). Unfortunately for the enemy, Aho explains, the truth of the myth about the enemy is reinforced when the enemy responds to the social "in" group "with paranoia, distrust, wiliness, and savagery" (Aho, p. 31). Aho explains, further, that if individuals are unaware of the arbitrary ways in which enemies are selected, they will feel compelled to act against the enemy in unspeakable ways because they have internalized the derogatory stories about the enemy. This is most likely to occur, according to Aho, when "those espousing the legends are 'significant others' to the victim, persons whose opinions the victim values or upon whom he is dependent for his well-being" (Aho, p. 32).

Through the unconscious acceptance, by teachers, school administrators, lawyers and judges, of derogatory stories about

particular types of students, the school community, in conjunction with the legal system, identifies, selects and creates juvenile offenders (Aho, 1995). Rather than admit that stories about particular students may be wrong, school officials will continue to fight against student enemies in an effort to eradicate evil from public schools. To school officials and the judicial system, any action against a student suspected of wrongdoing is justified and should not be questioned, because, after all, school officials seek to prevent other students and society from the evil the enemy is likely to inflict. This has led to a drastic reduction, in recent years, in the fourth amendment rights of students recognized by courts. In turn, the reduction in students' fourth amendment rights has been accompanied by the expansion of the rights of school officials to act, virtually unrestrained, against students who are labeled as evil doers, thereby justifying increasingly intrusive searches of students and heavier penalties for students who violate school rules.

Why enemies are created

The recognition of student rights began in the late 1960's. At that time school officials and courts began to recognize that students retained at least some level of constitutional protection over certain student behaviors occurring during the school day. While drugs were present in schools during the late '60's and throughout the '70's, courts seemed to acknowledge that students' constitutional rights were entitled to a degree of protection, but the exact contours of that protection had to be worked out case by case. During the 1970's, lower federal courts and state courts proceeded to answer such questions as: 1) What standard applies to searches of students by school officials?; 2) Are school officials state agents or private citizens? (i. e. Does the fourth amendment apply to searches conducted by school officials?); and 3) What standard applies when the police assist in the search of a student?

By the late 1970's it was generally accepted that school officials were state agents subject to the fourth amendment's proscription against unreasonable searches. During that period, even though the end result usually favored the school district, courts carefully considered the complaining student's privacy rights in determining whether or not the search violated the fourth amendment.

As time passed, the presence of drugs in public schools increased substantially leading to an increase in the number of

student searches. By the time the United States Supreme Court heard the first student search case in 1985 (*New Jersey v. T. L. O.*), the drug problem had grown significantly and it was accompanied by an increase in the presence of weapons in schools.

Court opinions soon began to reflect the growing concern among school officials and communities over the growing violence at school and drug use among students. Examples of this concern include such statements as: "School violence ... is reaching epidemic proportions" *In re D. S.*, (1993) and there is a "... contemporary crisis of violence and unlawful behavior..." in public schools (*New Jersey v. T. L. O.* (1985)).

The language used by the courts was designed to characterize the actions of school officials as legitimate and within the scope of their delegated authority. On one hand, the New Jersey Supreme Court granted "broad supervisory and disciplinary powers" to school administrators to "protect[ ] students from dangers posed by anti-social activities" of some students (*State ex. rel. T. L. O.* (1983) See also *Graham v. Knutzen*, (1972); *Horton v. Goose Creek Indep. Sch. Dist.*, (5th Cir. 1982);*Tarter v. Raybuck*, (6th Cir. 1984). That power, the court stated, was " directly related to the educational process" (State ex. rel. T. L. O. (1983), thereby implying that school officials had compelling reasons to take actions against disobedient students.

Students' behavior, on the other hand, began to be characterized as "anti-social," *Tarter v. Raybuck*, (6th Cir. 1984); *Horton v. Goose Creek Indep. Sch. Dist.*, (5th Cir. 1982); *Brooks v. East Chamber Indep. Sch. Dist.*, (S. D. Tex. 1989), "malicious and willful," *Darvy v. School*, (W. D. Mich. 1982), and in one instance the school was equated with a combat zone, *Commonwealth v. Scott*, (Pa. Super. 1988) due to the unruly behavior of students.

In addition, the rights of the other, non-violent students also were used to justify actions against those students who were searched as the following illustrates:

> ... the anxiety and fear which existed in Plaintiff's children as a result of the physical violence, the threats, the intimidation, harassment and lack of discipline prevailing at Knoxville interfered with their learning processes and was not a proper educational environment. *Zebra v. Sch. Dist. of Pittsburgh*, (Commw. Ct. Pa. 1972).

It seems that very early on the judicial system, school officials and communities comprehended how easy it was to justify student

searches when the behavior of those searched was characterized as violent, out of control and detrimental to the educational process. Through the mechanism of language, an enemy was created.

The concept of student as enemy evolved as our assumptions of the type of student who used drugs, and ultimately resorted to violence, emerged. During the '60's and '70's, drug use among students was frequently committed by middle class students who were experimenting with substances almost as a rite of passage. As we entered the 1980's drug use, even among the so-called "good kids," was getting out of hand. More and more drugs were coming into the schools and with this increased activity came gang involvement in the trafficking of the drugs. In most schools, gang members are from ethnically diverse backgrounds, with a high predominance of gang members coming from impoverished backgrounds. The face of the drug-using student changed from the innocent, drug experimenting, white middle class student to a student with a darker complexion, from single parent families that provided little or no supervision.

The First Paradox of the Enemy

The time was ripe to transform the student drug user into an enemy. Because of the increased incidents of health problems due to addiction as well as the increased use of weapons to protect oneself from aggression by others or to enforce a drug user's code of conduct; school officials, with judicial approval, began to attribute to the behavior of student drug users' an evil that required, at the minimum, correction, at the maximum, decimation (Males, 1996). This, according to Aho, (1994) illustrates the first paradox of the enemy: "Evil grows from the quest to defeat the enemy, however understood" (p. 11).

School officials subjecting students to increasingly intrusive searches justify the violation of students' privacy rights on the basis that any violation of a student's rights stems from the school official's desire "to rectify the wrong... that you have done to me" (Aho p. 11). When a student responds to an intrusive search by yelling obscenities at school officials or by refusing to cooperate in the search process, (see *Cornfield v. Consolidated School District No. 230 (1994))* the student is responding "out of a sense of victimization" (Aho, p. 11) because the concept of who is the enemy goes both ways.

Keen (1986) supports Aho's characterization and describes the process as projecting the negative aspects of our own personalities onto the enemy. In that way, we are able to retain all of the good aspects of our personalities, while the enemy has only bad qualities. If we perceive ourselves as good, our actions will be righteous allowing us to defeat the evil forces in the enemy without mercy or remorse.

The Second Paradox of the Enemy

This leads to the second paradox of the enemy described by Aho as the unifying function of the enemy. Concentrating on eradication of the enemy requires the group to work together "to secure their own short-term interests at the expense of others" (Aho p. 15). Yet, the unintended consequence of pursuing the goal of eliminating the enemy serves to unify or solidify the group in its actions against the enemy.

A look at school search cases over time, but particularly since 1985, reveals that courts and schools have been working together against an enemy described as a student who is violent, or who possesses or uses drugs on school property. It is not surprising, then, that the first school search case decided by the Supreme Court involved a student whose "evil" act was that she was caught smoking in a nonsmoking area of the school (*New Jersey v. T. L. O.*, 1985), and, when questioned, T. L. O. refused to admit her transgression. Further, her insistence that she was a nonsmoker led to the search of her purse by the assistant principal. There the assistant principal found a package of cigarettes--proof that T. L. O. had lied. End of story? No. The Supreme Court had to legitimize the assistant principal's continued search of T. L. O.'s purse, after discovery of the cigarettes, which ultimately yielded marijuana, a large sum of money, and a list of names of people who owed T. L. O. money, presumably for drugs they had purchased from T. L. O.

If the Supreme Court had refused to work with school officials against T. L. O.; that is, if the Supreme Court had concluded that the search of T. L. O.'s purse, after the cigarettes were found, had been too intrusive considering the object of the search was to prove that T. L. O. had lied about being a nonsmoker, then the Court would have had to find the search unreasonable and in violation of the fourth amendment. Under that sequence of events, the evidence of T. L. O.'s evil -- possession of marijuana -- would not have been admissible in

the delinquency proceeding against T. L. O. And it would have been the school officials who were punished for invading T. L. O.'s privacy rights.

This was an unacceptable result. Therefore, the Supreme Court united with the school for the purpose of justifying the assistant principal's actions against T. L. O. -- the enemy-- to ensure that T. L. O.'s evil would not be rewarded by excluding evidence of her crime from the delinquency proceeding. That was the short-term benefit of the T. L. O. decision. The long-term consequence of T. L. O. has been a steady increase in the authority of school officials to behave in any way they and the courts define as reasonable at the expense of students' constitutional rights against unreasonable searches and seizures.

The Third Paradox of the Enemy

The third paradox of the enemy, identified by Aho, is the duality of the enemy. Aho describes this paradox as presenting the enemy as separate and alien to the group while, at the same time, the enemy is within each member of the group. McClosky (1983) picks up this theme in his study of tolerance. There, McClosky concluded that individuals behave like others who are similar to them. Therefore, if we as individuals, accept mainstream conceptions about the nature of our society, it's norms and customs, what constitutes good and evil; then those who deviate from the norm are punished for defying the accepted social order.

Deviation from the norm is viewed with disrespect and leads to the denial of the enemy's civil rights, such as due process, and privacy rights. McClosky found that, with age, opinions about what behavior is socially acceptable becomes set and resistant to change. Considering that most school administrators are at least approaching middle age when they enter administration positions, and judges also are middle aged or older during their tenure on the bench, it is not difficult to understand why school officials justify intrusive searches based on their duty to maintain discipline and order in schools; and judges use this duty in evaluating student searches to uphold the actions of school officials even when those actions would not be upheld if the search were conducted by any other state agent in another setting.

Males (1996) goes one step further when he describes the way society has targeted adolescents as the cause of all social ills. Courts,

in particular, have used the law to accomplish the creation of student as enemy. On one hand, we seek to hold students responsible for their actions and when their actions involve violence or drugs, judges apply the law in full force to punish the student. On the other hand, judges frequently ignore the law when they review the actions of school officials who have searched a student. Judges defer to school officials' power to control and punish students while they justify the adult's behavior that would be scrutinized quite differently outside the school context.

Rule of Law

While we would like to believe that the law is an objective body of rules designed to ensure an orderly society, what is often ignored is how the law is generated and the role the law plays in defining the daily applications of the law (See Table 1). To ignore the personal narratives or stories of individuals is to misunderstand the role such narratives play in giving meaning to the law. Ross (1996) points out that "... the state's law is a product of the mix of rules and narrative, which together yield meaning, coupled with the State's commitment to that meaning" (p. 8). According to Ross, when a precept is combined with some narrative, a meaning will emerge based on the interaction between the precept and the narrative. The resultant meaning, then, "is expressed as a norm, as a rule for behavior" (p. 11). Norms are created informally "by the institutions of family, community, and religious faith" (Ross, p. 12).

For a social norm or rule of behavior to become law, commitment must be added to the precept and narrative. Those who enforce the law must be committed to the meaning of the law in order to enforce it. Commitment is demonstrated when state officials "use their authority and power to encourage, or discourage" a complaint (Ross, p. 13) (See Table 2). Therefore, enforcement of a law depends on the state official's commitment to a precept and some narrative illustrating the precept in a particular way. The law is shaped by the combination of the precept, the narrative and commitment. When an individual makes assumptions about certain groups of people, but fails to acknowledge and deal with those assumptions, then his/her actions will be influenced by those assumptions (Ross, 1996). When that individual is an agent of the state, the law will reflect the state agent's assumptions about groups of people (Ross, 1996).

Table 1

Role of Law

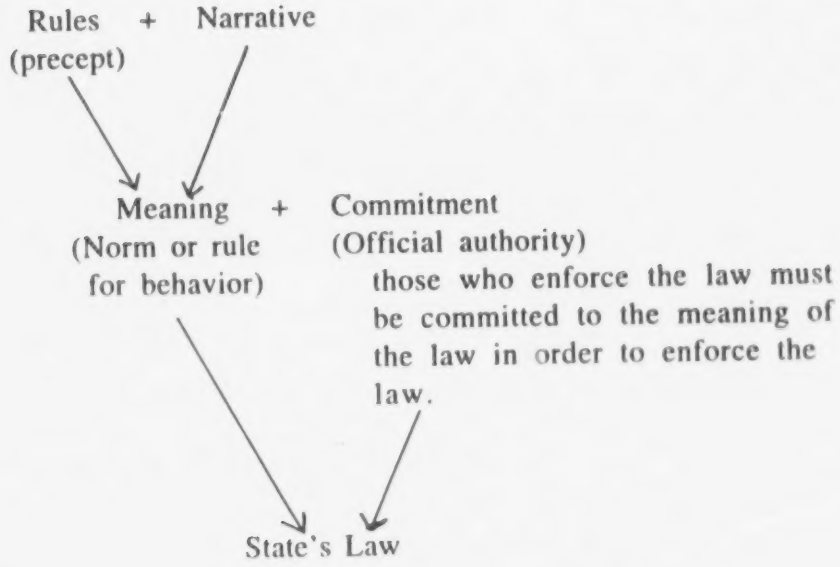
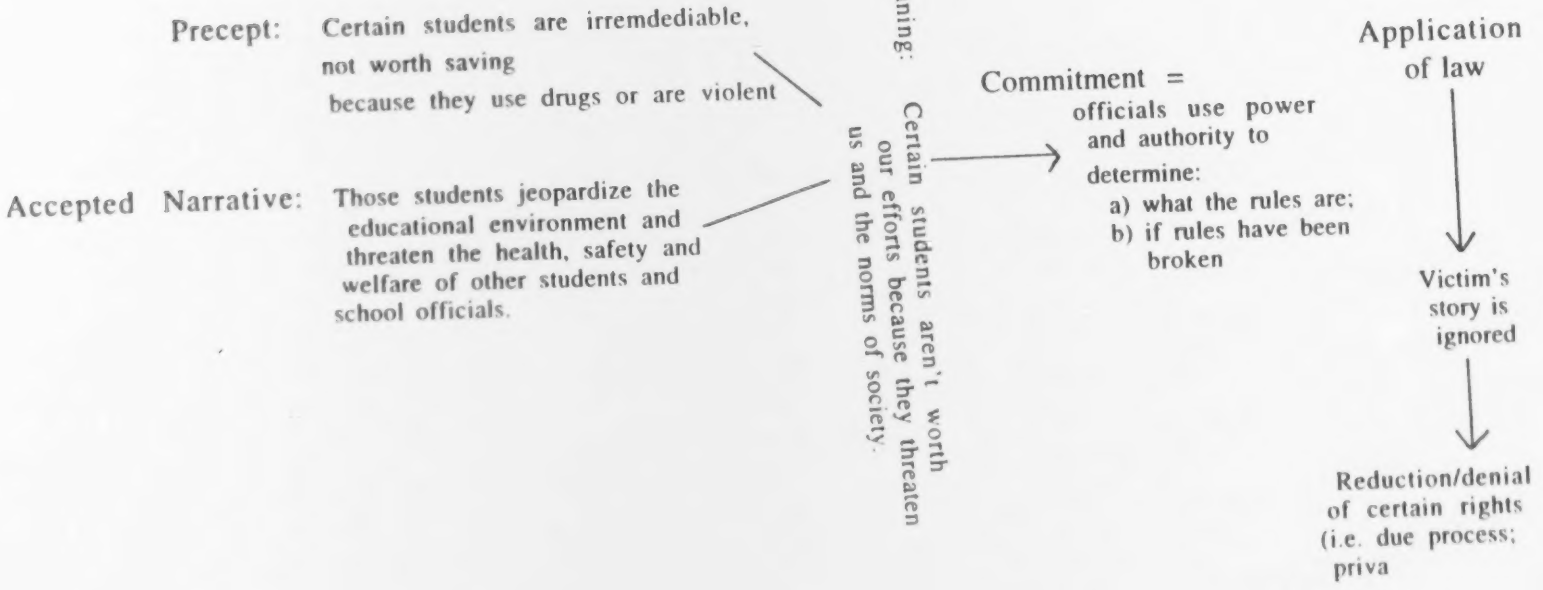


Table 2

Meaning of Law


Precept:
Certain students are irremdediable, not worth saving because they use drugs or are violent
Accepted Narrative:
Those students jeopardize the educational environment and threaten the health, safety and welfare of other students and school officials.
Meaning:
Certain students aren't worth our efforts because they threaten us and the norms of society.
Commitment =
officials use power and authority to determine:
a) what the rules are;
b) if rules have been broken
Application of law
Victim's story is ignored
Reduction/denial of certain rights (i.e. due process; priva

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When the state official is a school administrator or teacher who believes that certain students are irremediable, or throw-away kids, the law of the school, will reflect the precept that certain students are not worth saving because they are violent or use drugs. The accepted narrative is that those students jeopardize the educational environment and threaten the health, safety and welfare of other students and school officials. Add to this, the school official's authority to discipline and punish students who break school rules or the law and the result is a law that embodies the narrative that violent and/or drug using students are irremediable and, therefore, they are expendable.

Unfortunately for the students classified as irremediable, their narratives have been overlooked in the process of creating and enforcing the law which justifies the reduction or absolute denial of their rights. The resistance to acknowledging and dealing with these students' narratives is great because the meaning of the law, coupled with enforcement of the law, motivated by commitment, allows school officials to exert their power over those students characterized as irremediable.

This process is vividly displayed through the use of language used by the courts to justify the diminution of student rights over the years. *Doe v. Renfrow* (1980) and *Cornfield*, two cases decided by the Seventh Circuit 15 years apart, will be analyzed to illustrate the shift in the accepted precept and narrative that has led to a severe loosening of the rules applied in student rights cases as well as a new rule of law governing school searches based on the precept that some students are violent or pose a threat to the health, safety and welfare of other students because they use drugs.

Identifying Attributes of Evil

In *Cornfield*, (1995), the evidence the court relied on was a series of observations of "suspicious" behavior in the months preceding the search, a belief held by the teacher that Brian Cornfield didn't successfully complete a drug rehabilitation program, in addition to several other incidents suggesting Cornfield's addiction to drugs. All of these events, taken together, led the court to conclude that the strip search of Cornfield was justified at its inception (*New Jersey v. T. L. O.*, 1985). The court viewed those events as if they were one sequence of events culminating in the strip search of Cornfield in the school gym locker room. This

conclusion is problematic because, while each incident relates to drug use by Cornfield (except for one incident where school officials found Cornfield in possession of a live bullet) the events occurred over a period of months and did not yield any additional information relevant to the events on the day of the search that could be construed to create reasonable suspicion that Cornfield possessed drugs on the day of the search. The pertinent sequence of events is a review of the events, on the day of the search, that, taken together, indicate that evidence of drug possession will be found if a search is conducted.

If courts were allowed to conclude that a search based on several, isolated, and unrelated incidents over time was justified without any information or behavior on the day of the search that suggests that a search on that day would yield evidence of drug possession, then courts could approve searches of anyone based on knowledge of past criminal behavior without more information suggesting that the criminal behavior was continuing and that a search would yield evidence of current criminal activity. Outside the school setting, such a result is not acceptable.

The use of the facts in *Cornfield* by the Seventh Circuit in 1995 differs dramatically from the approach the same court used in 1980 to evaluate the actions of school officials leading up to the strip search in *Doe v. Renfrow*.

In *Cornfield*, the court implies that Cornfield's prior behavior establishes current and ongoing criminal behavior (possession of drugs). Further, the court also concludes that the impact of a strip search is somehow lessened by the fact that Cornfield was allowed to dress in his gym clothes once he removed his street clothes. But more importantly, because school officials merely observed Cornfield during the process and did not touch him, Cornfield's privacy rights were not significantly affected by the search, according to the court.

The student strip searched in *Doe v. Renfrow* was only touched slightly during the search of her person. She was allowed to remove her own clothing unassisted and the school nurse simply ran her fingers through Doe's hair to determine if drugs were hidden there. The court made no mention of the lack of physical contact between the one searched and the searcher as significant in reducing the embarrassment, humiliation and degradation of the strip search. In fact, the court attached much more importance to a student's core area of privacy in *Doe v. Renfrow* than it did in *Cornfield*.

("...subjecting a student to a nude strip search is more than just the mild inconvenience of a pocket search, rather, it is an intrusion into an individual's basic justifiable expectation of privacy." *Darryl H. v. Coler*, (1986), quoting *Doe v. Renfrow*, (1979). Why? Was it because Doe was a girl? Was it because she was under fourteen and therefore less capable of giving informed consent to a search? Or was it because in the subsequent years, drugs have become such a threat to the educational environment that the balance has shifted from an emphasis on the individual's privacy interests to an emphasis on the school's duty to maintain the educational environment and to protect the health, safety and welfare of the other students and school employees?

A look at the way the behaviors of each student have been used to justify a particular decision may be instructive. The District Court for the Northern District of Indiana addressed four issues in *Doe v. Renfrow*. The first issue was centered on the investigation conducted jointly by school officials and law enforcement officials to determine whether the investigation itself was a search and seizure under the fourth amendment. The court linked the issue of the investigation to the purpose of the school official's actions "of furthering a valid educational goal of eliminating drug use within the school." *Doe v. Renfrow* at 1018 (1979).

By characterizing the investigative process as the pursuit of a "valid educational goal," the court made it virtually impossible for a student challenging the investigative process to overcome the compelling interest school officials have in keeping drugs out of schools and away from all students. In deciding this issue, the court balanced the individual's interest against the school's interest.

When a student asserts a right to be free from searches, that right is balanced against the school's interest in maintaining a drug-free, and therefore, safe learning environment. In such cases, the court would weigh the interest of the student against the interests of school officials and the other students in the school. In that situation, it would be difficult to imagine a scenario in which an individual asserting a fourth amendment right to be free from "mass detention" and "deprivation of freedom" (*Doe v. Renfrow*, at 1018) would successfully swing the balance away from the school's interest of keeping other children safe from drugs.

Righteous Attributes of Those Who Search

In deciding whether or not the general inspection of all students in their classrooms, as part of an investigation of drug possession by students amounted to "a mass detention and deprivation of freedom" (or seizure) that violated the fourth amendment, the court focused on school officials' "discretion and authority" (*Doe v. Renfrow*, at 1018) to schedule activities during the school day. Labeling school officials' conduct as falling within their "discretion and authority" brings a normalcy to the actions of school officials that is difficult for students to challenge successfully. In *Doe v. Renfrow*, the district court concentrated on the power of school officials to "restrict" the movement of students during the school day "for other legitimate educational purposes" (*Doe v. Renfrow*, at 1018) to conclude that no seizure of Doe had occurred.

Doe also contended that entry into classrooms by school officials, accompanied by police officers, prior to the canine sniff was an unreasonable search. Like the mass detention issue, the court concluded that school officials had a right, under the doctrine of *in loco parentis*, to enter classrooms and such entry was consistent with the regular duties of school officials even when the school official was accompanied by a police officer and trained dogs.

The language used by the court to justify the detention and observation of students in their classrooms rested on the authority of school officials to supervise the educational environment and the need to maintain "an environment free from activities harmful to the educational function and to the individual students" (*Doe v. Renfrow*, at 1020).

The second issue before the district court in *Doe v. Renfrow* has been a recurring question of whether or not the use of dogs to detect marijuana and related paraphernalia, by itself, constituted a search under the fourth amendment (*Doe v. Renfrow*, at 1018). During the observation phase of the investigation process, the dogs in *Doe v. Renfrow* were present in the classrooms "at the request and with the permission of school administrators" (*Doe v. Renfrow*, at 1020). This language is used frequently by courts to justify the application of a lower fourth amendment standard than would by applied in the adult criminal context and to ensure the applicability of the lower standard when school officials work in conjunction with the police who are held to the higher probable cause standard. By reiterating that school officials have requested the officers' presence and, in

granting permission for police participation, school officials retain control over the search. Courts then are able to justify police participation in school searches without restricting police behavior in schools by holding the police to the probable cause standard. In this way, courts facilitate the law enforcement objectives of both school officials and the police without really applying the fourth amendment to school searches.

The Seventh Circuit went further, in *Doe v. Renfrow,* to justify the use of canine teams by characterizing the sniff as "a minimal intrusion at best" (*Doe v. Renfrow*, at 1020) that was not unlike other "intrusions into their classroom environment" (*Doe v. Renfrow*, at 1020). Such a minimal intrusion in a place where intrusions regularly occur wasn't significant enough to be considered a search.

The court did review the use of canines to sniff for drugs in criminal cases and concluded that in all of the cases where the police used canines to detect drugs, the police "had previous independent information or "tips" concerning the whereabouts of the drugs that were later sniffed out by the dogs" (*Doe v. Renfrow*, 1979, citing *United States v. Fulero*, (1974); *United States v. Bronstein*, (1974); *United States v. Solis*, (1976). In *Doe v. Renfrow*, (1979), the district court concluded that independent information existed because "school administrators had compiled an extensive list of previous incidents of drug use within the school" (*Doe v. Renfrow*, at 1021). Because a drug problem existed at the junior and senior high schools, and school officials were unable "to control or arrest the drug use problem" (*Dow v. Renfrow*, at 1021), the court applied the lower reasonableness standard because the use of the dog was directed at the "fulfill[ment of] the school's duty to provide a safe, ordered and healthy educational environment". Once the school's compelling interest was established, the next step, denying the student's privacy right, was simple ("... absence of any normal or justifiable expectation of privacy with respect to objects searched..." (*Doe v. Renfrow*, at 1021) because "Any expectation of privacy was necessarily diminished in light of a student's constant supervision while in school" (*Doe v. Renfrow*, at 1022).

Creating Group Solidarity

What the court did was to identify the precept, maintaining a safe educational environment free from drugs, then the court gave meaning to that precept through a narrative of the difficulty school

officials had faced in their unsuccessful attempts to control the drug problem prior to conducting the canine sniff. The resulting norm is that students' privacy rights lose most of their strength when school officials face serious drug problems in their schools.

Schools and courts have committed to the precept and narrative of the school's "duty and responsibility to maintain order, discipline, safety and education within the school system" (*Doe v. Renfrow*, at 1022) thereby creating a meaning for the norm that school officials can enforce without much concern for the rights of students.

In *Doe v.* Renfrow, up to the point where the dog alerted to a student, the district court maintained that no fourth amendment violation had occurred. But, the court at first appeared to agree with Doe that when the police officer ordered Doe to empty her pockets, a search had occurred and therefore the question of the student's privacy interests was raised again. The search of Doe's pocket was the third issue considered by the district court. Normally, an individual has a zone of privacy that is protected by the fourth amendment from state intrusion. If the normal fourth amendment rules were applied to the search of Doe's pocket, school officials would have had to establish probable cause prior to obtaining a search warrant (at the time of *Doe v. Renfrow*, 1979 the Supreme Court had not decided what standard governed school searches or whether or not a warrant was required).

Despite the legal uncertainty surrounding the warrant requirement and the search standard in school search cases, the court tried another approach that would allow the court to further minimize the importance of a student's fourth amendment rights in the school setting. Citing fourth amendment cases outside the school context, the district court set up the rationale for limiting students' privacy rights by focusing on the exceptions to the warrant requirement eliminating the need to establish probable cause prior to a search coupled with the doctrine of *in loco parentis* to justify the "modifi[cation of a] student's fourth amendment guarantee of a sphere of privacy..." (*Doe v. Renfrow*, at 10223). Because of the need for school officials "to maintain order and discipline in their schools to fulfill their duties under the *in loco parentis* doctrine to protect the health and welfare of their students" (*Doe v. Renfrow*, at 1023, citing *M v. Bd. of Educ. Ball-Chatham Comm. Sch. Dist. No. 5*, at 292, n. 31 (1977)) the district court resorted to the balancing of interests

test which, as stated earlier, places school districts in the more powerful position because of the compelling nature of the school official's duty toward other students.

Again, the language the court uses to characterize the state's interest clearly indicates that the court considers the state's interest to be stronger than the student's privacy interest. For example, the following characterization of "the school's interest in maintaining the safety, health and education of its students... grappling with the grave, even lethal, threat of drug use" (*Doe v. Renfrow*, at 1024) erects a very high hurdle for the student to overcome. Unfortunately for the student, her zone of privacy does not conjure up the same frightening visual as does a picture of the school as a potentially lethal battleground over drugs.

For the court to support the school district's actions, the pocket search must be reasonable within the meaning of the fourth amendment. In *Doe v. Renfrow*, the district court concluded that a search did not occur until after the dog alerted to Doe indicating the odor of marijuana on her person. The dog's alert provided reasonable suspicion for school officials to believe Doe had drugs in her possession at the time. Armed with reasonable suspicion, the subsequent search of Doe's pockets, by the police, presented no fourth amendment problem because the district court held that the school district's duty to maintain the educational environment and the responsibility imposed by the doctrine of *in loco parentis* to keep students safe was so significant that the individual student's privacy rights could not overcome the state's compelling interest.

The fourth issue centered on the nude search of Doe. Focusing on the reasonableness of the nude search of a teenaged girl, the district court held that the search was unreasonable even under the lower reasonable suspicion standard where the search was based solely on "the continued alert of a trained drug-detecting canine..." (*Doe v. Renfrow*, at 1024). The rationale for this holding can be traced back to the "individual's basic justifiable expectation of privacy" and the fact that the student searched was 13 and female. ("We suggest as strongly as possible that the conduct herein described exceeded the 'bounds of reason' by two and a half country miles." *Doe v. Renfrow*, at 93, n.6 (1980).

The precept accepted by the court was that a nude search of a female was very serious and an activity that schools should conduct only in rare instances, if ever. Where the only indication of the

presence of marijuana is the odor of the drug without additional information suggesting that the student possesses the drug, and the source of that information is a drug sniffing dog, there isn't enough information available to justify a conclusion that a search of the student's person will uncover the drug. To ensure that students will not be intrusively searched unless it is likely that drugs will be found as the result of the search, the district court held that a body search required probable cause because "another set of constitutional values comes into play" where "a more thorough examination of the student's body and clothing" is conducted (*Doe v. Renfrow*, at 1027).

Unifying Against the Enemy

Times have changed dramatically since the strip search of Doe was upheld by the Seventh Circuit in 1980. That change is no more dramatically portrayed than in the case of Brian Cornfield, a student strip searched by school officials in the jurisdiction of the same circuit court that spoke strongly against strip searches in public schools thirteen years previously.

The court's attitude toward strip searching and the rights of students had shifted dramatically in the intervening years. In *Cornfield v. Consolidated School District No. 230* (1994), school officials and the courts worked together as a unified force against the student suspected of drug possession. The process was initiated by a classroom aide who discovered Brian Cornfield outside of class without a pass. While questioning Cornfield about what he was doing out of class, the aide noticed an unusual bulge in the crotch of Cornfield's pants. The aide reported her observation to the classroom teacher who, in turn, reported the aide's observation to the assistant principal. Brian Cornfield was not detained at the time of the observation. The classroom aide did nothing more than report the rule infraction (being out of class without a pass) and her observation of the unusual bulge. Classes went on as usual, Brian Cornfield continued on his way, and no school official took any action to determine if Cornfield possessed any contraband at that time. In fact, school officials expressed no suspicion at all.

The next day, however, as Brian Cornfield was boarding the school bus at the end of the day, he was approached by the assistant principal and the special education teacher whose class Cornfield had skipped on the previous day. They removed Cornfield to the assistant principal's office where Brian Cornfield was informed of the

suspicions of drug possession from the previous day. Cornfield's response was a string of obscenities. In response to the assistant principal's request to conduct a search of Brian Cornfield's person, Cornfield referred the assistant principal to his mother. Despite Mrs. Cornfield's refusal to consent to the search of her son, the assistant principal and the special education teacher took Brian Cornfield to the boys locker room where they told him to change into his gym clothes.

A visual inspection of Cornfield's body was conducted by the two school officials while Cornfield changed his clothes. His street clothes were physically inspected in the hope of uncovering drugs to confirm suspicions that the bulge in Cornfield's pants the day before was, in fact, drugs. To their surprise, the school officials did not find any drugs in Cornfield's possession as a result of the search. School officials were left to explain to the court how and why they had searched Brian Cornfield.

The interaction between school officials and the court illustrates the second paradox of the enemy, that of unifying individuals for the purpose of eliminating the enemy. This was accomplished in the Cornfield case when the court accepted explanations offered by school officials to justify their actions despite the fact that no drugs were found on Brian Cornfield's person as a result of the search.

The unification process began with the court's acceptance of the sequence of incidents in the months preceding the search proffered by school officials as evidence that school officials had reasonable suspicion that a search of Cornfield's person would yield evidence of drug possession. The court said, "Cornfield's case does differ from other student search cases in that Spencer and Frye based their decision on evidence or events that had occurred over some period of time. *Cornfield*, 1323 (1993). In searching for a way to justify this search, the court did not ask why Brian Cornfield had not been detained and questioned on the day the aide reported seeing the suspicious bulge in Brian Cornfield's pants. The court also did not ask school officials to explain the connection between Cornfield's possession, months earlier, of a live bullet, Cornfield's admission of drug use in the past, his failure to successfully complete drug rehabilitation and the decision to search Cornfield the day after the unusual bulge in his pants was observed.

Historically, courts have refused to justify searches of individuals based on a history of prior bad (or criminal) acts without current evidence suggesting that the individual is continuing those bad acts. In Cornfield, the court concluded that information about Cornfield's past drug addiction, coupled with conversations about drugs and the possession of a live bullet two to four months prior to the search of Cornfield's person was sufficient, in and of itself, to create reasonable suspicion to search Cornfield for drugs, thereby satisfying the first prong of the T. L. O. standard. ("... Spencer and Frye relied on a number of relatively recent incidents reported by various teachers and aides as well as their personal observations, the *cumulative effect* of which is sufficient to create a reasonable suspicion that Cornfield was crotching drugs" (emphasis added Cornfield, at 1323). The result of this conclusion by the court was to justify an unreasonable search, thereby condoning the acts of school officials who were seeking to eliminate drugs from the school, at the expense of Brian Cornfield's fourth amendment right to be free from unreasonable searches and seizures.

Normally, searches are upheld where the incidents relied upon have occurred not only over a period of months, but also include information on the day of the search that indicates that evidence supporting the suspicions will be uncovered if the search is conducted immediately. In *Cornfield*, school officials had eyewitness reports from several adults that Brian Cornfield had a unusual bulge on the day before the search was conducted. But instead of searching him on that day, school officials waited until the end of the following school day to conduct the search without any information on that day that the eyewitnesses had again observed the unusual bulge in Cornfield's pants.

The court banded together with school officials against the student for the purpose of justifying this search and to retain the power of school officials over students like Brian Cornfield (or "to secure their own short-term interests at the expense of others" Aho, 1994) with no regard for the fact that Brian Cornfield's privacy had been invaded without reasonable suspicion that drugs would be found on his person on the day the search was conducted. School officials were rewarded for actions that would have violated Brian Cornfield's rights if the search were conducted outside the school setting or if Brian Cornfield were really treated as an adult.

The court's justification of the strip search of Cornfield is a significant departure from the established rule that searches should proceed from the least intrusive to the most intrusive based on the information available at the time of the search. School officials had reason to believe that Cornfield had hidden drugs in his underwear which caused an unusual bulge in his pants. Therefore, Spencer and Frye knew where to look for the drugs (crotch of Cornfield's pants), but instead of having Cornfield lower his pants so school officials could visually inspect the crotch area, they decided that a full blown nude search was the only way they could find the suspected drugs.

Considering that the observations of the unusual bulge occurred the day before the search, it is surprising that the court did not ask Spencer and Frye why they believed that a search, the day after the observation, would uncover drugs. On that basis, alone, the court should have concluded the search was unreasonable. But, the actions of these school officials, which began with a search succeeded in intrusiveness only by a body cavity search, were justified by the Circuit Court without much thought to the student's privacy interest.

In fact, the court accepted, without question, the explanation offered by Spencer and Frye that "a pat down [was] excessively intrusive and ineffective at detecting drugs." (*Cornfield*, at 1319). the court spent a good deal of time considering the concept of a nude search of a public school student, in the abstract, even going so far as to quote their own language in *Doe v. Renfrow* ("a nude search... is an intrusion into an individual's basic justifiable expectation of privacy." (*Cornfield*, at 1320-21, quoting *Doe v. Renfrow*, at 1024). The court went on to acknowledge the potential for adverse effect on a student subjected to a strip search stating, "... no one would seriously dispute that a nude search of a child is traumatic" (*Cornfield*, at 1321) and "the potential for a search to cause embarrassment and humiliation increases as children grow older" (*Cornfield*, at 1321 n. 1).

The court's justification of the strip search in *Cornfield* began with the reminder that the student's "legitimate expectation of privacy and security" must be balanced against "the government's need for effective methods to deal with breaches of public order." (*Cornfield*, at 1320). But just as quickly, the court added that "the needs of schools to maintain order does not require strict adherence to probable cause." (*Cornfield*, at 1320). Thus the stage was set to allow school officials to offer, as a justification for an intrusive search, the belief that they didn't know that a nude search was more

intrusive than a pat down on top of one's clothes.

The court went on to consider Cornfield's "criminal capacity." (*Cornfield*, at 1321). Because of his age, (16), Brian Cornfield was "presumed to be as capable of independent criminal activity as adults." (*Cornfield*, at 1321). No mention is made of the school official's duty, under *in loco parentis*, to protect the child (Brian Cornfield) in his charge. As Males(1996) posits, juveniles move in and out of adulthood for the convenience of the adults responsible for them. Students are portrayed as children when school officials/adults want to control their behavior. But when children break rules or laws, children are viewed as adults and punished severely.

Similarly, Brian Cornfield was transformed into an adult responsible for protecting himself. "Adolescents will generally have the same capacity as adults to understand the issues involved in a strip search, including deciding whether to consent." (*Cornfield*, at 1321). However, just as quickly as Brian Cornfield was transformed into an adult, capable of consenting to the search, Cornfield's refusal to consent to the search was ignored by the court. Further, despite his mother's refusal to consent to the search of Brian, school officials proceeded with the search and the court saw no problem with the lack of consent in concluding that the search was reasonable.

The unification of school officials and the court was further solidified when the court applied the second prong of the T. L. O. standard to the Cornfield search. The second prong of T. L. O. requires the court to evaluate the actions of school officials to determine if the intrusiveness of the search was warranted in light of the severity of the suspected infraction. In other words, the search must be no more intrusive than necessary to discover the contraband or evidence sought.

Unfortunately for Brian Cornfield, the court accepted, without question. Spencer and Frye's explanation "that a strip search was the least intrusive way to confirm or deny their suspicions." (*Cornfield*, at 1323). Other, less intrusive search techniques, were available to these school officials, but the court never asked why Cornfield had not been questioned the day before the search when the unusual bulge was observed. The court did not ask why the student had not been asked to empty his pockets or adjust his pants to release any drugs secured there.

Instead of asking those questions, the court accepted outright the testimony of Spencer and Frye that there were "a number of other independent factors" supporting their suspicions that Cornfield had drugs on his person. Those other incidents included a statement by Cornfield, more than three months before the search, that he was dealing drugs; Spencer's belief that Cornfield had not successfully completed a drug rehabilitation program three months prior to the search; finding a live bullet on Cornfield's person about a month before the searches as well as assorted statements by Cornfield and others that Cornfield "was constantly thinking about drugs" (*Cornfield* at 1322), selling marijuana, or smoking marijuana. Not one of those incidents provided a single piece of information, on the day of the search, that could lead a "reasonable" person to conclude that a search would uncover drugs. On the day of the search there was absolutely no suspicion, not even an unusual bulge in Cornfield's pants. In fact, the only time the bulge was observed by Cornfield's teacher was on the day before the search.

Conclusion

It is frightening to think that searches like the one in *Cornfield* have no trouble getting a judicial seal of approval, particularly when the actions of school officials fail both prongs of the current school search standard. But, as the number of cases with similar results continues to grow, parents will have to step in to protect their own children from school officials and courts who continue to whittle away at the fourth amendment rights of students. It appears that the only hope students have of recovering some level of protection of their privacy rights is for their parents to demand that changes are made to school policies to ensure those rights. It will be a long process with parents fighting this issue school by school, and district by district. Ultimately, school officials and courts will have to rethink the authority they have to intrude on such a fundamental right.

It strikes me as odd, the level of resistence I have encountered when I suggest to educational administrators and professors that students have constitutional rights while at school. It is odd because educators frequently profess to be in the education business for the sake of the children. Yet, whenever educators, particularly educational administration professors, gather at conferences, the focus always seems to be on leadership issues involving the

administrator-teacher relationship. Too often school administrators, and the professor who teach them, neglect the relationship between educational administrators and students and the relationship between teachers and students. If we are truly in the education business, we cannot afford to ignore those two important relationships, particularly when the students involved are troublemakers, potential or actual criminals. We cannot afford to ignore the interests and needs of those most difficult to care about students, the students who threaten the order and safety of our schools. It is those students who cost society the most when they are abandoned or ignored, or worse, vilified. They have become enemies and, as such, we are afraid to express too much interest in them or care too much about them, because of our fear of exposing ourselves to their vicious attacks on us when we reveal our softer sides. Yet, if we continue to ostracize these outsider students, we risk losing them as contributing members of society, and that is a price we should believe is too high. Ultimately, we must ask ouselves, can society afford to lose the positive contributions outsider students could make if they were taught a more positive approach to life? Then we might accept responsiblity for guiding those students rather than victimizing them before they victimize us.

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